## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I.

### OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears in full in the record (R. 715-725). Said case has not been reported in the advance sheets of the Federal Reporter, 2nd Series, as yet.

### II.

### JURISDICTION.

The jurisdictional statement will be found in the petition for writ of certiorari and is incorporated here by reference.

### III.

### STATEMENT OF CASE.

So far as is material to the questions here presented the statement of the case will be found in the petition for the writ of certiorari under "Statement of matter involved" and is incorporated here by reference.

### IV.

### SPECIFICATIONS OF ERROR.

(1) The Circuit Court of Appeals erred in holding that the conviction of petitioner should be affirmed.

(2) The Circuit Court of Appeals erred in affirming the District Court's refusal to direct a verdict of not guilty.

(3) The Court of Appeals erred in holding that there was sufficient evidence in the record to support the verdict of the jury.

(4) The Circuit Court of Appeals erred in holding that the agreements had between petitioner and the wardens who built the houses in question were wholly immaterial so far as this case is concerned.

(5) The Circuit Court of Appeals erred in holding that the allegations contained in the indictment charging that the procedure followed by the petitioner in building the houses in question violated the established plan, rule and practice of the State Highway Department was mere surplusage and the failure of the proof to substantiate it had no effect upon the validity of the conviction.

(6) The trial court erred in refusing to direct a verdict and the Circuit Court of Appeals erred in giving sanction to said error for the following reasons:

(a) There was absolutely no evidence produced during the trial to support the verdict.

(b) Because the uncontradicted probable testimony of witnesses for the Government and the petitioner demanded a finding of not guilty.

(7) The trial court erred in refusing to submit the petitioner's defense to the jury in accordance with the written requests to charge, and the Circuit Court of Appeals erred in giving sanction to said error, because the written requests to charge were vital to petitioner's defense.

## V.

## SUMMARY OF ARGUMENT.

1. A verdict of acquittal should have been directed.

(a) The Government failed to prove the scheme as alleged.

(1) No proof of rule, plan and practice of the Highway Board as alleged.

(2) No proof that houses became part of the realty.

(3) Uncontradicted proof that rule, plan and practice was different from that alleged.

(4) Uncontradicted testimony was that houses were placed upon lands under parol permission with leave to remove.

(5) Parol permission to erect houses gives right of removal under Georgia law.

(6) Uncontradicted and probable testimony binding on District Court and Circuit Court of Appeals.

(b) No scheme was proved which was calculated to defraud.

(c) No evidence of intent to defraud.

2. It was error for the Circuit Court of Appeals to hold that proof of the rule, plan and practice of the Highway Board as alleged in the indictment was surplusage.

3. It was error for the Circuit Court of Appeals to hold that it was wholly immaterial whether the Government proved the houses were placed on the lands of petitioner under circumstances which made them a part of his realty and therefore his property.

4. The trial court should have charged the jury as requested.

## VI.

## ARGUMENT.

### (1) VERDICT OF ACQUITTAL SHOULD HAVE BEEN DIRECTED:

(a) Circuit Judge Hutcheson went directly to the gist of this case when he said in his dissenting opinion:

> "Here, the charge was that defendant, relying upon a settled practice of the Board to place the houses on the properties under conditions which would attach them to the realty and to leave them on the properties when the wardens were through with their use, schemed to place houses on his own lands under circumstances which would make them a part of the realty and therefore his property. The uncontradicted proof that there was no such practice on the part of the Board and particularly that the houses were placed on the defendant's property under circumstances which, under the law of Georgia, prevented their becoming attached to the realty or in any way becoming his, completely negatived the charge and entitled the defendant to an instructed verdict of acquittal." (R. 724).

The indictment charged that the Highway Board of Georgia had a rule, plan and practice to build wardens houses on lands leased from individuals with the understanding that when said lands ceased to be used that the buildings constructed on the premises would become the property of the owners of the land and that the buildings were to be constructed of rough and undressed lumber only, and that knowing

this rule, plan and practice the petitioner caused the houses involved in this case to be built upon his lands and that they became a part of the realty. All of the evidence offered by the Government and petitioner shows that there was no such rule. (R. 240, 241, 242, 278, 279, 304, 305, 345, 417, 418, 152, 389, 390, 391, 394, 395, 405, 406, 407).

The majority opinion of the Circuit Court of Appeals held that these allegations in the indictment were mere surplusage and the failure of the proof had no effect upon the validity of the conviction. (R. 719).

On the other hand all of the witnesses testified that the rule, plan and practice was to get permission from the owners of the lands to build wardens' houses on their lands, to use the lands for this purpose and to remove the houses when the lands ceased to be used for the purpose.

Following this established practice of the Highway Board the petitioner gave the three wardens where the three houses involved in this case were constructed permission to build the houses on lands title to which had been deeded to him with the understanding that when they ceased to be used by the State Highway Board the houses and improvements were to be removed (R. 124, 130, 74, 162, 564, 565, 573, 574). This positive unimpeached and uncontradicted testimony as to the facts surrounding the construction of the houses involved on the lands deeded to petitioner was waved aside by the majority opinion of the Circuit Court of Appeals with the statement that the entire matter was wholly immaterial (R. 178).

There was no proof that the houses became a part of the realty and the uncontradicted testimony referred to above shows without a doubt that the houses were placed upon the lands of petitioner under

circumstances by which they could never become a part of petitioner's realty and title therefore vest in him.

The law of Georgia and the general law recognizes the validity of such parol agreements for the use of land.

Section 85-1404 of the Code of Georgia provides as follows:

> "85-1404. (3645). PAROL LICENSE; REVOCATION; EASEMENT RUNNING WITH LAND.—A parol license is primarily revocable at any time, if its revocation does no harm to the person to whom it has been granted; but is not revocable when the licensee has executed it and in so doing has incurred expense. In such case it becomes an easement running with the land. (3 Ga. 87; 49 Ga. 19; 53 Ga. 247; 69 Ga. 115; 93 Ga. 74; 19 S. E. 820)."

In regard to the right of removal of improvements made on land with the owner's permission we find the following in 31 Corpus Juris, page 310:

> "The improvements belong to the owner of the land when made under a stipulation to this effect. But where an improvement, such as a building, is put upon the land of another, by his permission, under an agreement or understanding that it shall belong to the occupant or may be removed at any time, it does not become a part of the real estate, but continues to be personalty, and the property of the person making it. If the improve-

> ment is made by the owner's permission, an agreement that it shall remain the property of the person making it is implied in the absence of any other facts or circumstances showing a different intention, but such an implication will not be drawn when a different intention is indicated by an express agreement between the parties, or from the interest of the party making the improvement or his relation to the title to the land."

And on page 312, Section 8, Volume 31 of Corpus Juris, we find:

> "By agreement — The right of removal may be given by express agreement between the owner and the occupant, or by an agreement implied from the circumstances, as from the owner's permission to make them."

And in volume 37 of Corpus Juris, page 296, we find the following:

> "Where a license to use property for specific purposes is not specially restricted, and is coupled with a grant or interest necessary to the possession and enjoyment of the rights acquired, the license is irrevocable so long as the interest continues. Upon this principle, where one places his property on the premises of another by virtue of a contract or by the landowner's permission, the implied license to enter and remove it is irrevocable."

In reference to the granting of a parol license and the right of removal of buildings erected under a

parol license we cite the cases of AINSLEE v. EASON & WATERS, 107 Georgia, 748, and CHARLESTON RAILWAY COMPANY & HUGHES, 105 Georgia, 15.

In this connection we wish to cite the case of MAYOR AND COUNCIL OF GAINESVILLE v. DUNLAP, 147 Georgia, page 344. We quote, headnote four, from said decision as follows:

> "Where in order to reach the reservoir the City laid a water main through the lands of others under a lease or parol license which was silent as to the rights of removal of the pipe or pipes, the laying of the pipes not being for the improvements of the realty but for the use of the City in the operation of its waterworks, the pipes are in nature of trade fixtures and removable at any time by the City without the consent of the landowners."

The ruling of the Circuit Court of Appeals in holding that there was sufficient testimony to support the verdict and affirming the refusal of the District Judge to direct a verdict for the petitioner is a decision on an important question of general law which is untenable and in conflict with the weight of authority and in conflict with applicable decisions of ths Court.

This Court has held in the case of U. S. v. HESS, 124 U. S. 483, 8 Supreme Court Reporter, 571, as follows:

> "The statute is directed against "devising or intending to devise, any scheme or artifice to defraud", to be effected by communication through the postoffice.

> As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised, or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial."

It is elementary that the Government must prove all of the essential averments of the indictment and in this case it was essential to prove that the petitioner acted under a settled practice of the Highway Board substantially as alleged in the indictment under conditions which would attach the houses to the realty and leave them on the properties when the wardens were through with their use. The evidence failed to show that the houses were placed upon his lands under the circumstances alleged in the indictment and, therefore, the Government failed to prove these essential elements.

In the case of the U. S. v. HESS, 124 U. S., 483, this Court held:

> No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital."

A fraudulent scheme is an essential element in the crime of using the mails to defraud and the failure to allege the scheme to defraud and to prove it substantially as alleged is fatal to the prosecution. AIKEN v. U. S., 108 Federal 2nd, 182.

In the case of FASULO v. U. S., 272 U. S., 620, 47 Supreme Court Reporter, 281, this court said the

words "to defraud" primarily mean "to cheat; they usually signify the deprivation of something of value by trickery, deceit, chicane, or over-reaching."

The uncontradicted testimony is that the houses in question were placed on petitioner's lands under a well known practice of the State Highway Department that permission would be secured from others to erect wardens' houses on their lands with the understanding that they were to be removed when ceased to be used by the Department, and that the houses involved in this case were placed on his lands under a definite understanding between the wardens and petitioner that his lands were to be used for the purpose, and the houses and improvements were to be removed when the lands ceased to be used by the Department.

The Government relied entirely upon circumstantial evidence and we insist that this uncontradicted testimony as to the practice of the Highway Board and as to the agreement between the wardens and the petitioner is binding upon the District Court and was binding upon the Circuit Court of Appeals. Therefore, the decision and judgment of the Circuit Court of Appeals has decided an important question of general law which is untenable and in conflict with the weight of authority, and a Federal question in conflict with applicable decisions of this Court.

In this connection we submit the following:

VOLUME 23 CORPUS JURIS, page 47, Section 1791:

> "UNCONTROVERTED EVIDENCE.
>
> Uncontradicted evidence should ordinarily be taken as true, and cannot be wholly discredited or disregarded if not opposed

> to probabilities or arbitrarily rejected, even though the witnesses are parties or interested——."

VOLUME 23 CORPUS JURIS, page 49, Section 1792:

> "There is, however, no rule that circumstances sufficient to establish a fact shall have the force and effect of the direct testimony of at least one credible witness, and indeed it has been said that circumstantial evidence is inferior in cogency and effect to direct evidence."

In the case of CHESAPEAKE & O. RY. CO. v MARTIN, ET. AL., 283 U. S., 209, 51 Supreme Court Reporter, 453, on page 456 of the 51 Supreme Court Reporter, the Supreme Court of the United States said:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been

shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of the opinion that this was not enough to take the question to the jury, and that the court should have so held."

In this case the Supreme Court also held:

"In M. H. Thomas & Co. v. Hawthorne, supra, at page 972 of 245 S. C., the rule is thus stated:

"A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit the uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury. That it is proper for a trial court to instruct a verdict upon the uncontradicted testimony of interested parties, when it is positive and unequivocal and

there is no circumstance disclosed tending to discredit or impeach such testimony, can be said to be a settled rule in Texas."

The Court of Appeals of Georgia in the case of the ATLANTIC COAST LINE RAILROAD CO. v. DRAKE, 21 Georgia Appeals, page 81:

"If material to the issue between the parties, the uncontradicted testimony of an unimpeached witness cannot in any case be arbitrarily disregarded by any tribunal, whether judge or jury, whose duty it is to consider the evidence and decide the issue in accordance therewith. Where, therefore, as a result of proved facts, only a prima facie presumption arises that certain additional facts exist in favor of one party, and positive, unequivocal, and uncontradicted testimony is introduced in behalf of the other party, emphatically denying the facts thus presumed, such presumption is legally rebutted and can not prevail against such testimony."

The Supreme Court of Georgia in the case of FRAZIER v. GEORGIA RAILROAD AND BANKING COMPANY, 108 Georgia, page 807, held:

"When a plaintiff's right to recover depended upon the establishment of a particular fact, and the only proof offered for this purpose was circumstantial evidence, from which the existence of such fact might be inferred, but which did not demand a finding to that effect, a recov-

> ery by the plaintiff was not lawful, when, by the positive and uncontradicted testimony of unimpeached witnesses, which was perfectly consistent with the circumstantial evidence relied on by the plaintiff, it was affirmatively shown that no such fact existed."

We respectfully submit that all of the circumstances in this case are more consistent with the innocence than with the guilt of the petitioner. However, in the case last above cited it has been held in Georgia that unless the circumstantial evidence was of such a character as to demand a finding, that a verdict is not lawful which ignores positive and uncontradicted testimony of unimpeached witnesses. This Court in the case of PENNSYLVANIA R. CO. v. CHAMBERLAIN, 288 U. S., 333, 53 Supreme Court Reporter, 391, said:

> "We, therefore, have a case belonging to that class of cases where proven facts given equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the the other, before he is entitled to recover. United States F. & G. Co., v. Des Moines Nat. Bank (C. C. A.) 145 F. 273, 279, 280, and cases cited, Ewing v. Goode (C. C.) 78 F. 442, 444; Louisville & N. R. Co., v. East Tennessee, V. & G. Ry. Co. (C. C. A.) 60 F. 993, 999; Tucker Stevedoring Co. v. W. H. Gahagan (H. C.) 6 F. (2d) 407, 410; Blid v. Chicago & N. W. R. Co., 89 Neb. 689, 691, et. seq.—"

The rule established in the case of the Pennsylvania Railroad Company v. Chamberlain, supra, was a civil case and, if the burden there set forth applies in civil cases, there should certainly be a greater burden in a criminal case resting upon the Government.

Does the fact that the houses were placed upon lands of petitioner raise any presumption against petitioner? We think not. However, the only proof the Government has is the fact that the housese were placed upon his lands and the petitioner and all of the witnesses, both for the Government and petitioner, by positive and uncontradicted testimony explained all of the circumstances surrounding the construction of these houses on his property. The uncontradicted testimony is that petitioner gave the wardens in each instance permission to place the houses on his lands with the understanding that they would be removed by the State when the lands ceased to be used for the purpose. In addition to this the State Highway Board approved the entire transaction and petitioner confirmed the original understanding in writing to the State Highway Board (R. 485). The placing of these houses on the lands of petitioner was done under a long established practice of the Highway Board which was definitely established and proved.

Therefore, if there had been any presumption which arose upon proof that the buildings were placed upon his lands that presumption has been by uncontradicted testimony explained and the burden is upon the Government.

In the case of MACON, D. & S. R. CO. v. STEPHENS, 19 South Eastern Reporter, 2d Series, page 32, the Court of Appeals of the State of Georgia said:

> "In action against railroad for damages for killing of cattle, presumption of negligence created by proof that cattle were killed by train was rebutted when railroad introduced testimony of engineer and fireman which clearly explained every material fact connected with the killing, and the burden was on plaintiff to show by evidence without the aid of the statutory presumption that the killing of the cattle was caused by negligence of railroad's employees. Code, Section 94-1108."

In the above cited case there was a statutory presumption against the railroad and they hold that even the statutory presumption is overcome and that the burden then rests upon the plaintiff when the material facts connected with the killing were explained.

This is a criminal case and there is no statutory presumption. On the other hand, there is a presumption in favor of petitioner and in favor of his innocence which should remain with him throughout the trial of the case.

(b) It is admitted by both the majority and the minority opinion of the Circuit Court of Appeals that the scheme to defraud as alleged in the indictment failed of proof. As a matter of fact, no scheme of any kind was proved which was calculated to defraud. The Government's own witnesses testified that the houses were placed upon petitioner's lands under such circumstances that the houses and improvements could never be his and that they at all times would and did remain the property of the State Highway Board. Petitioner's testimony and the testimony of the other witnesses confirmed this and there was not a single

circumstance in the case to the contrary. The majority opinion waved this question aside by saying that it was wholly immaterial (R. 718).

Circuit Judge Hutcheson in his dissenting opinion in this connection said:

> "In so holding, the court erroneously held, in effect, that it was not necessary for the state to prove the existence of the scheme it had alleged, or indeed any scheme calculated to defraud; it was sufficient if the jury believed not that defendant had, as charged, devised a scheme to place the houses on his land under such conditions that he would acquire the title thereto, but had, with an evil hope and wish not exhibited in the scheme he charged but entertained in his heart that the state might forget or fail to take the houses off, permitted the wardens to build more expensive houses on his land than had been built on the land of others from whom permission to build houses had been obtained.
>
> "This will not at all do. There are no common law crimes against the United States, U. S. v. Eaton, 144 U. S. 677; Norton v. U. S., 92 F. (2) 756." (R. 722-723).

We respectfully submit that while a scheme to defraud within the meaning of the Act of Congress does not have to be successful, yet, it must be calculated in some way to defraud. The words "to defraud" usually signify the deprivation of something of value by trick or deceit, etc. FASULO v. U. S., 272 U. S., 620; HAMMERSCHMIDT v. U. S., 266 U. S., 182.

Therefore, we say that even if petitioner had schemed to have these houses placed upon his lands that they were placed there under such circumstances that he could have never acquired title to them and the scheme could not have been calculated to defraud the State or the State Highway Department.

In the case of NORTON v. U. S. 92 Federal Reporter, 2nd Series, on page 755, we find the following statement in this connection:

> "It is stated that, "If the scheme or artifice in its necessary consequence is one which is calculated to injure another, to deprive him of his property wrongfully, then it is to defraud within the meaning of the statute."

The quotation in the Norton case is from HORMAN v. U. S., 116 Federal, 350, 352, from the Sixth Circuit Court of Appeals.

In discussing the Horman case and the above quotation from it this Court said in the case of FASULO v. UNITED STATES, 272 U. S., 620, 47 Supreme Court Reporter, 200, and in the case of HAMMERSCHMIDT v. UNITED STATES, 265 U. S., 182, 44 Supreme Court Reporter 511 that the Horman case went to the verge and that since that decision Section 5480 had been amended to make its scope clearer and that the construction of the Act could not be used as authority to include all dishonest methods of deprivation the gist of which is the use of the mails.

However, this Court in both the Hammerschmidt case and the Fasulo case evidently approved the statement in the Horman case that it is the necessary consequence of the scheme or artifice that it be calculated to injure another.

Therefore, we insist that no scheme which might be inferred from any circumstance in this case could be calculated to injure the State of Georgia or the State Highway Board of Georgia.

(c) There was no evidence of any intent to defraud produced in the case and the circumstances surrounding the placing of these houses on petitioner's lands were explained fully by the witnesses for the Government and petitioner. This testimony was uncontradicted and undisputed, probable and consistent with all of the circumstances of the case.

In the case of NORTON v. U. S., 92 Federal, 2nd, 753, the Circuit Court of Appeals for the Sixth Circuit held:

> "Intent to defraud is essential element of offense of using mails to defraud, and there can be no such intent where party making representations knows that no deception can result."

In the body of the opinion in the Norton case we find on pages 754 and 755 the following:

> "(1) On its face the indictment appears to present a scheme to defraud Gable by representing to him that he is the father of appellant's child, conceived and born in England. Since the intended victim had not been in England he could not have been tricked by this falsehood. It is not, however, a necessary ingredient of the offense punishable by the statute that the one toward whom false representations are directed shall actually be misled by them. The circumstances may

> be such as to render him immune to deception. Hill v. U. S. (C. C. A. 5, 1934) 73 F. (2d) 223.
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> "(2) But intent to defraud is an essential element of the offense. The person devising the fraudulent scheme must intend in some manner to delude the person upon whom the scheme is practiced. There can be no intent to deceive where it is known to the party making the representations that no deception can result."

In this case we say there could have been no deception and therefore no intent to defraud.

The universal and unvarying rule of the Highway Department, known to the petitioner, and testified to by every witness in the case was that wardens' houses were to be placed upon lands of individuals and then moved when the convict camp was moved. This is undisputed in the case.

The members of the State Highway Board held responsible positions and were intelligent men. The petitioner, according to the testimony in this case held a very responsible position with the State of Georgia and was a very intelligent man.

The only way that any fraud or intent to defraud could have possibly gotten into this case would have been under some circumstances whereby the petitioner had tricked the Highway Board and placed the buildings on his lands under such conditions as would have prevented the Highway Board from removing them.

This was not true in this case under the undisputed testimony and every circumstance surrounding the case.

On account of the fact that the petitioner and all the wardens and officials of the Highway Board knew of the custom and practice of the Highway Board there are no conditions under which the petitioner could have placed these buildings on lands belonging to him whereby the buildings or improvements would have become a part of his real estate.

Therefore, for any fraud or intent to defraud to exist in this case it must have been with reference to some facts such as these detailed and not the fact that they were placed on his own lands.

The placing of the houses on his lands under these circumstances could never be any fraud and no deception could therefore result.

Consequently, the petitioner, being an intelligent man and holding a responsible position, was obliged to know that no deception could result on account of his knowledge of the practice and custom of the Highway Department and his knowledge of the fact that the custom and practice of the Highway Board was well known not only by the present officials in office but their predecessors in office.

2. The gist of the indictment as alleged was that the petitioner violated the rule, plan and practice of the Highway Board and placed upon his lands buildings and improvements under circumstances which made them a part of his realty. This being the case the allegations in the indictment as to the rule, plan and practice were material and the holding by the Circuit Court of Appeals that the rule, plan and practice of the Highway Board was mere surplusage is error and is contrary to the law.

3. Likewise, it was error when the Circuit Court of Appeals held that it was wholly immaterial

in this case if the Government failed to prove that the houses were placed on the lands of petitioner under circumstances which made them a part of the realty. If the houses and improvements did not become a part of the realty and did not become the property of petitioner there should be no conviction in this case. Otherwise, he could not have profited and the State could not have been defrauded.

4. However, if we should be wrong in our opinion that the District Court should have directed a verdict of not guilty in favor of petitioner then we submit that the District Court should have submitted petitioner's defense to the jury as requested in writing. The petitioner moved for a directed verdict upon the trial of his case, and in the alternative, for special charges submitting his defense, to the effect that if the houses were placed on his property, under an agreement that they were removable, their placing there was not and could not be fraud. The district judge refused these requests to charge and the majority opinion of the Circuit Court of Appeals affirmed his refusal on the ground that it was wholly immaterial "whether or not under the circumstances of each transaction, the state at all times had the right to remove the houses at will."

In this connection Circuit Judge Hutcheson in his dissent said:

> "In so holding, the court erroneously held, in effect, that it was not necessary for the state to prove the existence of the scheme it had alleged, or indeed any scheme calculated to defraud; it was sufficient if the jury believed not that defendant had, as charged, devised a scheme

to place the houses on his land under such conditions that he would acquire the title thereto, but had, with an evil hope and wish not exhibited in the scheme he charged but entertained in his heart that the state might forget or fail to take the houses off, permitted the wardens to build more expensive houses on his land than had been built on the land of others from whom permission to build houses had been obtained.

"This will not at all do. There are no common law crimes against the United States, U. S. v. Eaton, 144 U. S. 677; Norton v. U. S., 92 F. (2) 756." (R. 722-723).

The evidence in regard to the removability of houses was undisputed and uncontradicted and we pectfully submit for the Court to dismiss this im-tant point by saying that the entire matter is olly immaterial was error and is contrary to law and the dicisions of this Court and the failure of the irt to charge as requested and the failure of the cuit Court of Appeals to reverse the District Court s clearly in error.

It was very material to petitioner that if the e was to be submitted to the jury that his defense submited fairly and that the failure of the court to so was error and the case should be reversed.

The majority opinion of the Circuit Court of peals held that the District Court's refusal to give se requested instructions was not error (R. 719).

If for no other reason the requests to charge should have been given for the reason that jurors generally know that the Statute of Frauds in Georgia usually requires all contracts and agreements with reference to title to real estate to be in writing. This is one of the exceptions to the general law and jurors and the public generally are not familiar with the exceptions to the Statute of Frauds and the petitioner was entitled to have had this point made clear to the jury at least.

5. Conclusion.— If the judgment of the District Court and the Circuit Court of Appeals is allowed to stand in this case, then we must sanction the doctrine that in case of indictment under the Mail Fraud Statute it is not necessary to prove the existence of the scheme to defraud as alleged in the indictment, or of any kind of scheme calculated to defraud. Then, the use of the Mail Fraud Statute as a catch-all will be encouraged and the conduct of trials under the statute will be so lax and loose until it will be impossible for an innocent person to ever prepare a defense.

Already it is well known among trial lawyers in criminal cases that less evidence is required to convict in a prosecution for violation of the Mail Fraud Statute than even for recovery in civil cases. The decisions of the courts in reference to the limits that the Government may go in this connection have not been clearly defined and, in view of the possible abuse that may be made of the Mail Fraud Statute, we are of the opinion that this Court should take jurisdiction of this case, pass upon the questions which have been raised and clearly define the law applicable thereto.

It is most respectfully submitted, therefore, that this case is one calling for the exercise of this

Court's power of supervision by granting the writ of certiorari and reviewing and reversing the decision of the Honorable United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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W. Paul Carpenter

ATTORNEYS FOR PETITIONER.